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No. 82-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*, *Petitioners*,

v.

EAGLE-PICHER, INC., *et al.*, *Respondents*.

BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., et al

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ROBERT N. SAYLER
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel of Record
for *Amici Curiae*

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Typewritten form
February 18, 1983
Printed form

(attorneys listed on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

ROBERT N. SAYLER
WILLIAM P. SKINNER
JOHN E. HEINTZ
SCOTT D. GILBERT
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

DENNIS E. KINNAIRD
LUCY T. EISENBERG
MUNGER, TOLLES & RICKERSHAUSER
Fifth Floor
612 South Flower Street
Los Angeles, CA 90017

Attorneys for Armstrong World Industries, Inc.

E. JUDGE ELDERKIN
WILLIAM R. IRWIN
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Attorneys for Fibreboard Corp.

ROBERT R. REEDER
COZEN, BEGIER & O'CONNOR
Suite 1931
Three Penn Central Plaza
NEC 16th & Market Streets
Philadelphia, PA 19102
Attorneys for Crown Cork & Seal Company, Inc.

FRANK H. GRIFFIN, III
DECHERT, PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Attorneys for ACandS, Inc.

DANIEL PHILLIPS
MANAGER OF LITIGATION
OWENS-CORNING FIBERGLAS CORPORATION
Fiberglas Tower
Toledo, Ohio 43659

JEROLD OSHINSKY
ANDERSON, BAKER, KILL & OLICK
1800 K Street, N.W.
Suite 1102
Washington, D.C. 20006
Attorneys for Keene Corporation

CHARLES P. SCHROPP
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
501 East Kennedy Blvd.
P. O. Box 3324
Tampa, Florida 33601
Attorneys for The Celotex Corp.

DAVID A. WELTE
POLSINELLI, WHITE & SCHULTE
4705 Central
Kansas City, MO 64112
Attorneys for Standard Insulations, Inc.

RICHARD F. MCMENAMIN
MORGAN, LEWIS & BOCKIUS
123 South Broad Street
Philadelphia PA 19109
Attorneys for Brand Insulations, Inc.

JAMES A. YOUNG
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, PA 19102
Attorneys for Asten Group, Inc.

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INTEREST OF AMICI AND BACKGROUND OF THE CASE

This brief is filed on behalf of: Armstrong World Industries, Inc.; ACandS, Inc.; Asten Group, Inc.; Brand Insulations, Inc.; The Celotex Corporation; Crown Cork & Seal Company, Inc.; Fibreboard Corporation; Keene Corporation; Owens-Corning Fiberglas Corporation; and Standard Insulations, Inc.[1] All of the Amici, directly or indirectly, have either manufactured, sold, installed, or distributed products containing asbestos.

This case concerns the "trigger" and the "scope" of coverage under a Comprehensive General Liability Policy when claims are made against a policyholder for damages allegedly caused by exposure to asbestos. "Trigger" refers to the event that must occur during the period of a policy in order for insurance coverage to apply. "Scope"

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[1] This brief was originally filed in typewritten form on February 16, 1983.

refers to the extent of an insurance company's obligations under a policy once coverage is "triggered."

Amici have a vital interest in these subjects because, like Eagle-Picher Industries, Inc. ("Eagle-Picher"), each of them has been named as a defendant in thousands of lawsuits in which claimants seek damages allegedly caused by exposure to asbestos contained in products formerly manufactured, sold, or distributed by one or more of them.[2] Unlike Eagle-Picher, however, which had no insurance for such claims prior to 1968, most Amici have for many years continuously purchased comprehensive general liability insurance policies, including coverage for the products liability hazard. Coverage for many Amici commenced in the 1930's.

The language of the insurance policies that have been purchased by most Amici is very similar or identical to the language in the policies involved in this case. With two exceptions, each Amicus is presently engaged in litigation with its respective insurance carriers concerning the obligations of the insurers with respect to claims for asbestos-related injuries.[3] These lawsuits are pending in various jurisdictions in the United States as set forth in Attachment A.

The injuries that give rise to the underlying claims for damages begin when or shortly after asbestos fibers are ingested or inhaled and become lodged in body tissue. Thereafter, in those individuals eventually diagnosed as having an asbestos-related disease, injury continues to

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[2] By the early 1970's, each Amicus had ceased to produce or sell asbestos-containing products of the type on which such suits have most often been based.

[3] Brand Insulations, Inc. and Owens-Corning Fiberglas Corporation are the exceptions.

occur to surrounding tissues in the body for a period of many years. External symptoms of these injuries (e.g asbestosis, mesothelioma, and bronchogenic carcinoma) may not appear until ten to forty years after inhalation or ingestion. When symptoms do appear, it is impossible to determine what portion of the injury occurred during a particular period of time.

Because of the continuous and progressive nature of asbestos-related injuries, claimants in the underlying cases frequently have alleged that they inhaled asbestos fibers in the 1940's or 1950's and continued to inhale asbestos fibers over a period of many years. When claimants have proven compensable injuries from asbestos fibers, the courts have typically held the defendants jointly and severally liable for the injuries because it is impossible to determine what portion of the injury was caused by each company's products or occurred at particular times. *See, e.g., Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

The standard language of a Comprehensive General Liability Policy provides that coverage is triggered by "injurious exposure to conditions, which results, during the policy period, in bodily injury."[4] Once coverage is triggered, the policies provide that the insurance company must "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages." The policies also provide that an insurance company must defend all suits seeking damages from the policyholder on account of alleged bodily injury that oc-

[4] These cases all concern the language of standard insurance policies drafted by trade associations of insurance companies. "Bodily injury" is defined in the policies to include "bodily injury, sickness or disease."

curred during the policy period, even if such claims turn out to be false or fraudulent.

When the earliest asbestos-related claims were filed, many of Amici's insurers undertook to defend them and to pay any resulting liability without financial participation by the insured. By the mid-1970's, however, as the volume of cases increased substantially, and it became apparent that more claims would be filed in the future, a large segment of the insurance industry, including the most significant insurers of most Amici, simultaneously: (1) refused to sell insurance policies providing any effective coverage for asbestos-related claims; and (2) began taking the position, contrary to their prior practice, that coverage under a pre-existing policy was not triggered unless external symptoms of a claimant's asbestos related injuries had become "manifest" (that is clinically discernable) during the period of the policy.

Another group of insurers, including the petitioners in this case, propounded an "exposure/pro rata" theory of coverage under the policies. Under that theory, coverage under a policy was triggered by a claimant's inhalation of asbestos fibers during the policy period, but the "scope" of each insurance company's defense and indemnification obligation was reduced to a pro-rata share based on the total number of years of inhalation. Each insurance company would accept responsibility only for its pro-rated portion of the cost, leaving the insured to pay any remaining costs.

The two approaches developed by the insurance industry would deny each Amicus substantial amounts of the coverage it purchased over many years. Under the "manifestation" approach, although a company may have been fully insured throughout the period in which individuals allegedly were injured from exposure to its products, it

nonetheless would be deprived of the benefit of the insurance it had obtained because the symptoms of the asbestos-related injuries had not become manifest until later years, when no insurance was available. Under the "exposure/pro rata" approach, while injuries that began shortly after initial inhalation of asbestos would be covered, the additional progressive injuries that occured after inhalation had ceased would not be covered. Moreover, insurers would be allowed by means of a post hoc, arbitrary formula to allocate a portion of their responsibility for covered claims back to their insureds, notwithstanding their express promise to defend all suits and pay all damages when bodily injury is alleged to occur during the policy period.

Numerous lawsuits have been filed concerning the trigger and scope of coverage for asbestos-related claims. There have been decisions on the merits in four federal courts of appeal.[5] *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982) (Pet.App.A[6]) ("*Eagle-Picher*"); *Keene Corp.* v. *Insurance Company of North America*, 667 F.2d 1034

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[5] Although most of the lawsuits concerning these questions have been filed in state courts, there are no state court decisions on the merits concerning the trigger and scope of coverage for asbestos related claims. There is a federal district court decision granting partial summary judgment in a fifth case. Commercial Union Insurance Company v. Pittsburgh Corning Corp., et al., Civil Action No. 81-2129 (E.D. Pa. slip op. filed December 4, 1981), Asbestos Litigation Reporter p. 4263 (December 11, 1981). In that case, the court rejected on a motion for partial summary judgment the claim that "manifestation" is the only trigger of coverage and held that "exposure" is an event triggering coverage under the policies.

[6] In this brief, the petition for certiorari is cited as Pet. p. ____. The Appendix to the petition is cited as Pet.App. p.A-____.

(D.C.Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh. denied*, 102 S.Ct 2024 (1982) ("*Keene*"); *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ("*Porter*"); and *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ("*Forty-Eight Insulations*").

In *Eagle-Picher*, the First Circuit accepted a "manifestation" theory of coverage that had been advocated by the insured at trial. In *Forty-Eight Insulations*, the Sixth Circuit accepted an "exposure/pro rata" theory that the insured advocated on appeal with respect to indemnification costs. In *Porter*, the Fifth Circuit followed *Forty-Eight Insulations* as to the trigger of coverage in a dispute among three insurance companies concerning their obligations to each other. There was no issue in that case of the scope of coverage available to the insured. And in *Keene*, the D.C. Circuit accepted a more comprehensive interpretation advocated by the insured in that case, concluding that coverage is triggered by all of the injury that occurs during the period from first inhalation of asbestos fibers through the manifestation of symptoms, including the period of progressive injury subsequent to inhalation. The D.C. Circuit also held that each insurer was liable to its insured for the total cost of a covered claim rather than an arbitrarily assigned share.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Circuits That Warrants Review By This Court

The Court should deny *certiorari* in this case for the same reasons that it denied *certiorari* in *Keene*, *Porter*, and *Forty-Eight Insulations*. In *Ruhlin* v. *New York*

Life Insurance Co., 304 U.S. 202, 206 (1938), the Court stated:

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

On that ground alone, *certiorari* should be denied. The contractual issues involved in *Forty-Eight Insulations*, *Porter*, *Eagle-Picher*, and *Keene* are exclusively governed by state law. No federal court can finally determine how these issues should be resolved. Under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), state courts are the only courts that can settle the question authoritatively.

As Travelers Indemnity Company of Rhode Island stated to this Court in its brief opposing certiorari in *Forty-Eight Insulations* (at p. 14), "[t]he risk of inconsistent applications of identical policy terms is a risk assumed by every insurer that transacts business in more than one state." In cases involving, for example, punitive damages, building collapse, the completed operations hazard, and the "business pursuits" exclusion, courts applying the laws of different states to the standard language of insurance policies have reached different results.[7]

This Court does not ordinarily devote its limited resources to harmonizing decisions among the circuits on issues of state law, even where — unlike here — the circuits truly are in conflict with one another. Recogniz-

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[7] See, e.g., Annot., 71 A.L.R. 3d 1072 (1976); Annot., 58 A.L.R. 3d 12 (1974); and Annot., 48 A.L.R. 3d 1096 (1973).

ing this, petitioners urge the Court to go beyond its traditional role in our federal system and undertake to enunciate a rule on a non-federal issue for "uniform" national application in both state and federal courts. Even if the Court were inclined to undertake the novel role of acting as a national arbiter on a matter of state law, it certainly should not undertake that role in a case where factual anomalies and severe deficiencies in the record, described below, would inevitably compromise any decision it might render.

Moreover, close examination of the decisions in *Forty-Eight Insulations*, *Eagle-Picher*, and *Keene* reveals that there is no disagreement among the circuits on the controlling principles of law.[8] All of the circuits agreed that the policies should be liberally interpreted in a way that gives effect to their purpose of providing coverage, and that any ambiguities in their language should be resolved in favor of the insured. *Forty-Eight Insulations*, 633 F.2d at 1219-22; *Eagle-Picher*, 682 F.2d at 17, and 23 (Pet.App. pp.A-11, and A-20); and *Keene*, 667 F.2d at 1041. The differences in outcome are primarily attributable to factual differences in the circumstances of the insured, and the state of the record in each case.

Forty-Eight Insulations was a case that was brought by Insurance Company of North America, a major proponent of the "manifestation" theory after it switched to that position in 1977, against one of its smallest and financially weakest insureds in an effort to obtain prompt judicial sanction for its newly adopted theory of coverage. The record in the case was severely limited, and did not

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[8] Since *Porter* did not involve an insured, it has little relevance here. In any event, it followed *Forty-Eight Insulations* as to the trigger of coverage.

include the extensive documentation that has subsequently been produced in other cases concerning the drafting history of the standard insurance policies, and the contemporaneous and subsequent interpretation of those policies by insurance companies.[9] At the trial, the insured argued that the policies were ambiguous, that they could reasonably be interpreted as providing coverage on an "exposure" basis, and that such an interpretation should be adopted because it provided more coverage in its case than a "manifestation" interpretation. Both the district court and the court of appeals agreed. The insured did not appeal the district court's conclusion that the liability of an insurance company for a covered claim should be limited by a pro rata allocation that required the insured to bear some of the costs of paying claims.[10]

Eagle-Picher was also tried on a severely limited record that did not include any documents relating to the drafting and historical interpretation of the policies by insurance companies.[11] The insured had entered into a letter agreement with its primary insurance company, Liberty Mutual, that expressly provided that the policies would be interpreted on a "manifestation" basis. All of the parties agreed at trial that the language of the policies was clear and unambiguous. The First Circuit emphasized that if a party had argued that the policies were

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[9] One of these documents is discussed in part II, below.

[10] The insured did appeal the question of whether it should be required to bear a portion of its defense costs. The court of appeals concluded that defense costs and indemnification costs should be allocated in the same fashion. 633 F.2d at 1226.

[11] Amici submitted some of the more important documents relating to these matters to the First Circuit on appeal, but the court expressly declined to consider them because they had not been submitted to the trial court. 682 F.2d at 22 n.8 (Pet.App. p.A-19 n.8).

ambiguous it would have had "a different and more compelling case." 682 F.2d at 21 (Pet.App. p.A-16).

At trial, the insured argued that the policies should be interpreted to afford coverage on a "manifestation" basis because an "exposure" interpretation would have left it virtually without insurance. Eagle-Picher had not purchased any insurance until 1968, by which time most of the exposure to its asbestos-containing products had already occurred.[12] Both the district court, and the court of appeals agreed with the argument that Eagle-Picher made at trial. The court of appeals rejected, however, Eagle-Picher's attempt for the first time on appeal to obtain coverage on the continuous injury basis adopted in *Keene*, noting, among other things, that Eagle-Picher could not reasonably have expected its policies to afford coverage on that basis given the position that it had taken at trial. 682 F.2d at 23 (Pet.App. p.A-21).

The record in *Keene* was considerably more complete than the records in *Forty-Eight Insulations* and *Eagle-Picher*. It included some, but not all, of the documentation concerning the drafting of the policies and their historical interpretation by insurance companies. In *Keene*, the insured argued that the policies were — at best for the insurance companies — ambiguous, that they could reasonably be interpreted to provide comprehensive coverage from the date of first exposure to asbestos through manifestation of symptoms, and that such an interpretation should be adopted because it was a correct legal interpretation of the language of the policy and because it promoted coverage. The insured also argued that each insurance company should be held fully liable for the total

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[12] Eagle-Picher had manufactured products containing asbestos for approximately forty years ending in 1971. The insurance policies that were the subject of the litigation below were purchased during the period from 1968 to 1979.

cost of any covered claim, and that there was no basis in the language of the policies for arbitrarily apportioning some of the expense to the insured. The court of appeals accepted these arguments.

All three decisions interpret the policies to afford most of the coverage advocated by the insured at trial. All three base their interpretation, at least in part, on the conclusion that insurance policies should be liberally construed to give effect to their purpose of extending coverage. Two of the decisions are also premised on the conclusion that the policies are ambiguous, and that ambiguities should be resolved in favor of the insured *(Keene* and *Forty-Eight Insulations)*. In the third case all of the parties, including the insured, agreed at trial that the policies were clear and unambiguous *(Eagle-Picher)*. While the results are different, the legal principles are the same. There is, therefore, no conflict among the circuits on any question of law that warrants review by this Court.

II. This Case Is An Inappropriate Vehicle For Review

The major claim advanced in support of the petition for *certiorari* is that a decision by this Court will definitively resolve important questions concerning the scope of insurance coverage for asbestos-related claims for the entire insurance industry. Pet., pp.7-15. As pointed out above, however, these are questions of state rather than federal law. Even putting that aside, it is clear that this is not an appropriate case in which to attempt to decide the broad coverage questions presented by the petition.

The record in this case does not include the extensive documentation that has been obtained through discovery in other cases concerning the drafting of the policies, and their historical interpretation by insurance companies.

No decision by this Court, or any other, can fairly limit the coverage of an insured who contends that the policies are ambiguous, and introduces such documents to support the reasonableness of a broader interpretation.

One example proves the point. The minutes of an April 21, 1977 meeting of an insurance industry discussion group on asbestos state:[13]

> "The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on [the] risk during any part of that period could be fully responsible for the cost of defense and loss."

That construction of the policies is indistinguishable from the interpretation that was accepted by the D.C. Circuit in its 1981 *Keene* decision. The 1977 meeting was attended by representatives of most of the major liability insurers in the United States, including affiliates of the petitioners in this case.[14]

Other insurance industry documents provide ample confirmation that the views expressed by the majority at the 1977 meeting were widely held in the insurance industry, and had been for some time. There are documents that show, for example, that the insurance industry has

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[13] A copy of these minutes, together with a list of attendees at the meeting, is attached as Attachment B to this Brief. The minutes were submitted to the court of appeals in an Appendix to the Amicus Brief filed on behalf of Armstrong World Industries et al. at pp. A-66 to 67 (Amici Appendix).

[14] Petitioner Turegum Insurance is a wholly owned subsidiary of Zurich Insurance Co. which was represented at the meeting. Petitioner Excess Insurance Co. is an affiliate of the Hartford Group which was also represented at the meeting. See Pet., p.iii, List of Parties.

on more than one occasion expressly considered amending the standard policy language to provide for a manifestation trigger, and even drafted policy language having that effect. The documents also show that the insurance industry has consciously rejected such a limitation of coverage.[15]

This evidence clearly has an important bearing on the proper resolution of the broad coverage questions presented in the petition for *certiorari*. Because it was not submitted to the trial court, the First Circuit expressly declined to consider it on appeal. 682 F.2d at 22 n.8 (Pet. App. p.A-19 n.8). It would be difficult for this Court to evaluate such evidence for the first time on review, even if it were inclined to do so. Under the circumstances, the appropriate course is to deny the petition. These questions, which affect the financial health of an entire industry,[16] cannot be decided adversely to the interests of policyholders on the basis of a record that does not include evidence concerning the drafting and historical interpretation of the policies by insurance companies.

CONCLUSION

The principal relief sought by the petitioners is a declaration that Eagle-Picher's insurance policies do not provide coverage for asbestos-related injuries that become manifest during the period of the policy unless the

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[15] See, e.g., documents included in the Amici Appendix submitted to the court of appeals.

[16] Three manufacturers of asbestos-containing products are already in bankruptcy at least in part as a result of the large volume of claims that have been filed against them. The refusal of insurance companies to honor their contractual commitments contributes to the financial problems of the industry.

injured claimant also inhaled asbestos during that period. The effect of such a ruling would be to deprive Eagle-Picher of the benefit of most of its insurance coverage. All of the policies were acquired after 1968. Most of the exposure occurred prior to that time.

Petitioners are not entitled to such relief. The lower courts erred because they provided too little coverage, not too much. Eagle-Picher opposes certiorari in this case; petitioners, having fully litigated their claims below and lost, are not entitled to further review.

Respectfully submitted,

/s/ ROBERT N. SAYLER

Robert N. Sayler
Counsel of Record for
Amici Curiae
Armstrong World Industries,
Inc., *et al.*

Date: February 16, 1983
Typewritten form

February 18, 1983
Printed form

ROBERT N. SAYLER
WILLIAM P. SKINNER
JOHN E. HEINTZ
SCOTT D. GILBERT
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Armstrong World Industries, Inc.

E. JUDGE ELDERKIN
WILLIAM R. IRWIN
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Attorneys for Fibreboard Corp.

ROBERT R. REEDER
COZEN, BEGIER & O'CONNOR
Suite 1931
Three Penn Central Plaza
NEC 16th & Market Streets
Philadelphia, PA 19102
Attorneys for Crown Cork & Seal Company, Inc.

FRANK H. GRIFFIN, III
DECHERT, PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Attorneys for ACandS, Inc.

DANIEL PHILLIPS
MANAGER OF LITIGATION
OWENS-CORNING FIBERGLAS CORPORATION
Fiberglas Tower
Toledo, Ohio 43659

DENNIS E. KINNAIRD
LUCY T. EISENBERG
MUNGER, TOLLES & RICKERSHAUSER
Fifth Floor
612 South Flower Street
Los Angeles, CA 90017

JEROLD OSHINSKY
ANDERSON, BAKER, KILL & OLICK
1800 K Street, N.W.
Suite 1102
Washington, D.C. 20006
Attorneys for Keene Corporation

CHARLES P. SCHROPP
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
501 East Kennedy Blvd.
P. O. Box 3324
Tampa, Florida 33601
Attorneys for The Celotex Corp.

DAVID A. WELTE
POLSINELLI, WHITE & SCHULTE
4705 Central
Kansas City, MO 64112
Attorneys for Standard Insulations, Inc.

RICHARD F. MCMENAMIN
MORGAN, LEWIS & BOCKIUS
123 South Broad Street
Philadelphia PA 19109
Attorneys for Brand Insulations, Inc.

JAMES A. YOUNG
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, PA 19102
Attorneys for Asten Group, Inc.

ATTACHMENT A

Pending Asbestos Insurance Litigation Involving Amici[1]

Armstrong World Industries, Inc. v. *Aetna Casualty & Surety Co., et al.* No. C-315367 (Super.Ct., Los Angeles Cty., Ca., complaint filed March 6, 1980)*

ACandS, Inc. v. *The Aetna Casualty and Surety Co., et al.*, Civil Action No. 80-1341 (E.D.Pa. complaint filed April 4, 1980)

Asten Group, Inc., t/a Asten-Hill Co. v. *Commerce & Industry Insurance Co.*, et al., No. 58-19 (Ct. of Common Pleas, Philadelphia City, Pa., filed July 15, 1980)

The Celotex Corporation v. *Aetna Casualty and Surety Co., et al.* No. 79-5885 (Cir.Ct., Hillsborough Cty., Fla., complaint filed May, 1979)

Crown Cork & Seal Company, Inc. v. *Aetna Casualty and Surety Co.*, No. 1292 (Court of Common Pleas, Phila. Cty., September Term 1978)

Fireman's Fund Insurance Company v. *Fibreboard Corporation, et al.* No. C753-885 (Super.Ct., San Francisco Cty., Ca., complaint filed May 29, 1979)*

Keene Corp. v. *Insurance Co. of North America*, Civil Action No. 78-1011 (D.D.C. complaint filed June 6, 1978)

Standard Insulations, Inc. v. *Royal Indemnity Insurance Co., et al.* CV 80-14909 (Cir.Ct. Jackson Cty., Mo. complaint filed Aug. 20, 1980)

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[1] Brand Insulations, Inc. and Owens-Corning Fiberglas Corporation are not involved in such litigation.

* These cases have been coordinated with GAF Corp. v. Insurance Company of America, et al., No. C286017 (Super.Ct., Los Angeles Cty., Ca., filed May 31, 1979) and Johns-Manville Corporation, et al. v. The Home Insurance Company, et al., No. C765-226 (Super.Ct., San Francisco Cty., Ca., filed March 31, 1980) sub. nom. In re Asbestos Insurance Coverage Cases, No. 1072 (Super.Ct., San Francisco Cty., Ca.).

ATTACHMENT B

AMERICAN INSURANCE ASSOCIATION

85 John Street
New York, N.Y. 10038
(212) 433-4400

May 20, 1977

ENTERPRISE LIABILITY STUDY GROUP

Memorandum of the Meeting of
April 21, 1977

Enclosed is memorandum with attachments covering the meeting of April 21, 1977.

/s/ Chas. F. Berryman
CHAS. F. BERRYMAN
Assistant Vice President
American Mutual
Insurance Alliance

/s/ Richard F. Ingegneri
RICHARD F. INGEGNERI
Claims Counsel
American Insurance
Association

RFI:rc
Enclosures
cc: William L. Martin

MEMORANDUM OF MEETING OF DISCUSSION GROUP

ASBESTOSIS - APRIL 21, 1977

Executive Conference Room
12th Floor
85 John Street
New York, New York 10038

The meeting of the discussion group on asbestosis opened with a consideration of the question "who owes a defense?" The problem arises in asbestosis claims because of the long duration of the condition. As a result, several insurers could be on the risk and periods of non-insurance may also exist. Consequently, the crucial question, is when did the injury occur for coverage purposes? Two views emerged, which might be characterized as the majority and minority view. The minority view was that the event which triggered coverage was the discovery or diagnosis of asbestosis. While there is no authority directly in point to sustain this view, the advocates of this position relied on *U. S. F. & G.* v. *American Insurance Company*, 345 N.E. 2d 267. The minority also argued that their view should be tested through litigation and that, if successful, the result would be that asbestosis, as an industry problem, could be contained. The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on *Borel* v. *Fibreboard Paper Products Corporation*, 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit (applying Texas law).

The majority was cognizant of the fact that *Borel* was not a coverage case. Despite this, however, the majority believed that the essential holding of *Borel*, i.e. that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each carrier covered the loss and would be liable for the full defense and

possibly the full loss as well. Amongst those carriers favoring the majority view, it was reported that some were working out agreements to pro-rate the loss and defense costs with one carrier acting as a lead carrier. The question was raised as to whether these agreements included insureds where periods of noncoverage existed. It was reported that the insureds were also agreeing to participate on a pro-rata basis for both the defense costs and the losses. One of the carriers advised it would supply a copy of such an agreement which could be distributed to the entire group. This has not as yet been received and therefore cannot be distributed at this time.

The next question discussed was settlement possibilities which might occur before trial. All agreed that the interest of the insured should be given priority consideration so that no possible cause of action for bad faith could arise.

The group was then asked whether they would be willing to identify their insureds so that a list could be prepared which would be distributed. It was agreed that this was desirable. With such a list, as soon as a new suit is received, reference could be made to the list and contact between the carriers involved facilitated. To date, only one company has supplied its list of insureds and therefore distribution cannot be made with this memorandum. The possibility of reducing defense costs by the sharing of technical knowledge and possibly using single counsel for multiple defendants was next considered. It was suggested that carriers interested contact Mr. Ingegneri if they wished to use single counsel and Mr. Ingegneri would advise them of other carriers who indicated a similar interest. It was recognized that problems with insureds would have to be resolved before single representation was resorted to.

With respect to the pro-rata sharing of the loss and other costs, the majority were of the opinion that this was an equitable manner to proceed. They also expressed concern that if litigation were resorted to, the result might be conflicting decisions in the various states. The method of dividing the loss and defense expenses could be subsequently resolved by negotia-

tions and/or arbitration. It was suggested that the arbitration procedures utilized in the cumulative injury workmen's compensation cases in California might be utilized. Attached are copies of the Workers' Compensation Inter-Insurer Arbitration Agreement, its Rules and Regulations and the Arbitration Request Notice.

One other view was expressed, i.e. that a test case be brought and attempt to have this decided directly by the United States Supreme Court. The consensus that there was little likelihood of this approach being successful. Finally, the group discussed the possible use of governmental immunity as a defense. In this connection, the case of *Sanner* v. *Ford Motor Company*, 364 A.2d 43, Superior Court of New Jersey, Law Division, was cited which held that a manufacturer of a vehicle produced in strict compliance with U.S. Army plans could not be held liable for an alleged design defect.

Attention was also called to a recent case *McNeece* v. *United States*, which is pending in the United States District Court for the Eastern District of Texas. In this case, employees are seeking to recover from the United States Government alleging that under the *Walsh-Healy and OSHA Acts*, the United States Government has a duty to warn employees of the danger of working with asbestosis.

The meeting closed with a unanimous rejection of a suggestion that liability in asbestosis cases be admitted and the carriers agree between themselves as to their respective losses and expenses.

For the convenience of the group, attached is a separate memorandum summarizing the cases discussed.

Respectfully submitted,

/s/ Chas. F. Berryman
CHAS. F. BERRYMAN
Assistant Vice President
American Mutual Insurance Alliance

/s/ Richard F. Ingegneri
RICHARD F. INGEGNERI
Claims Counsel
American Insurance Association

ATTENDEES AT MEETING OF ASBESTOSIS
April 21, 1977 - 10:00 A.M.

PLAINTIFF'S EXHIBIT 12

NAME	COMPANY
W. J. Kearney	Admiral Insurance Co.
R. Matalewski	Aetna Life & Casualty
C. A. Piano	Aetna Life & Casualty
W. N. Edwards	American ReInsurance
J. F. Fisher	American ReInsurance
D. J. Ellsworth	American Mutual
J. H. Pollard	American Mutual
E. McIllwaine	Chubb & Son
D. O. Ellis	Commercial Union Cos.
E. Harris	Continental Insurance Co.
P. N. Steinlage	Employers Insurance of Wausau
R. Buell	Fireman's Fund
R. Gidney	Hartford Group
D. Connell	Hartford Group
J. McMahon	Insurance Company of North America
R. Pellatiro	Insurance Company of North America
E. Keena	Kemper Insurance
R. Hempton	Liberty Mutual
C. Caldon	Reliance Insurance Co.
J. Robinson	Reliance Insurance Co.
M. V. Albert	Security Insurance Co. of Hartford
D. Slitt	Security-Textron of Hartford
A. W. Wiechniak	Travelers Insurance Company
F. H. McAleer	Zurich Insurance Company
R. F. Ingegneri	American Insurance Association
C. F. Berryman	American Mutual Insurance Alliance

Exhibit 2

Commercial Union Ex. 2 (Schmalz)
P.L. 10/21/82

CERTIFICATE OF SERVICE

I, Robert N. Sayler, a member of the Bar of this Court and one of the Attorneys for *Amici Curiae* Armstrong World Industries, Inc., *et al.*, hereby certify that I have this 18th day of February, 1983, served the accompanying printed brief for *Amici Curiae* on all parties to this proceeding by causing three (3) copies thereof to be mailed to the following:

CHARLES R. PARROTT, ESQ.
ANDREW J. MCELANEY, JR., ESQ.
BRIAN T. KENNER, ESQ.
ROBERT S. BRINTZ, ESQ.
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
Attorneys for Eagle-Picher Industries, Inc.

FRANCIS J. BOUSQUET, ESQ.
FRANK A. SMITH, III, ESQ.
HERLIHY & O'BRIEN
100 Federal Street
Boston, Massachusetts 02110
Attorneys for American Motorists Insurance Company

JOHN M. HARRINGTON, JR., ESQ.
GEORGE MARSHALL MORIARTY, ESQ.
CHERYL A. LAFLEUR, ESQ.
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
Attorneys for the Bird Group

MALCOLM B. ROSOW, ESQ.
LEWIS HERMAN, ESQ.
STANDARD, WEISBERG, HECKERLING & ROSOW
61 Broadway
New York, New York 10016
Attorneys for Philip Alan Froude, et al.

CHRISTOPHER C. MANSFIELD, ESQ.
Liberty Mutual Insurance Company
175 Berkeley Street
Boston, Massachusetts 02117
and
GERALD V. WEIGLE, JR., ESQ.
DINSMORE, SHOHL, COATES & DEUPREE
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
Attorneys for Liberty Mutual Insurance Company

/s/ Robert N. Sayler
ROBERT N. SAYLER